

*a***PHANG YONG FOOK****v.****PUBLIC PROSECUTOR**

HIGH COURT MALAYA, KUALA LUMPUR

ZAKARIA YATIM J

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[CRIMINAL APPEAL NO. CR52-24 OF 1987]

30 SEPTEMBER 1987

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CRIMINAL LAW AND PROCEDURE: *Bail - Revocation of bail - Court's power to commit person released on bail of non-bailable offence to custody - Section 388(v) CPC - Procedure to be adopted - DPP informs Court information received reveals appellant "has been harassing and tampering with witness" - Whether mere vague allegations sufficient - No form of evidence either oral or documentary or even affidavit to support allegations - Whether order of revoking bail valid order - Where evidence adduced in support of revocation of bail - Whether accused should be given a hearing before cancellation.*

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This was an appeal to the High Court against an order revoking the appellant's bail by the Sessions Court Judge, Kuala Lumpur and committing him to custody. The bail was revoked on the application by the learned DPP who told the Sessions Court Judge that he had been informed that the appellant "has been harassing and tampering with the witness".

The question for the High Court to consider was whether the order revoking the appellant's bail was a valid order.

*e***Held:**

[1] It is not disputed that the learned Sessions Court Judge has the power to commit a person, who has been released on bail in respect of a non-bailable offence to custody as provided under s. 388(v) of the Criminal Procedure Code. However, the CPC does not lay down the procedure to be adopted by the Court in exercising its discretion under s. 388(v) of the CPC.

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[2] There was no oral or documentary evidence or even an affidavit that the appellant "has been harassing and tampering with the witness" as the learned DPP only made vague allegations of harassment, tampering and intimidation in support of his application to revoke the bail in the Court below.

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[3] The considerations for cancellation of bail are different from those for granting bail. The powers to take back accused has to be exercised with care and circumspection in appropriate cases when by a preponderance of probabilities it is clear that the accused is interfering with the cause of justice by tampering with the witnesses. Even when evidence is adduced in support of an application to cancel the bail granted to an accused person, the Court should not allow the application without giving the accused person an opportunity to be heard first.

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[4] For the reasons stated above the revocation order made by the learned Sessions Court Judge was set aside and an order was made that the appellant be released forthwith on the terms of the bail bond executed by him and his sureties.

[Appeal allowed. Revocation order set aside. Order that appellant be released on bail.]

Cases referred to:

Public Prosecutor v. Wee Swee Siang [1948] 14 MLJ 114

Sant Ram & Others v. State [1952] Cr LJ 1223

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Maibam Bidhu Singh & Others v. Manipur Administration [1959] Cr LJ 1453

Madhukar Purshothan Monkar & Anor. v. Talab Haji Hussein & Ors. [1958] AIR Bombay 466
R.K. Nabanchandra Singh v. Manipur Administration [1964] 2 Cr LJ 307
The State v. Sanjay Gandhi [1978] AIR SC 961

Legislation referred to:

Criminal Procedure Code [Ind], ss. 388(v), 389, 437(5)

Other sources referred to:

Sohoni's, *Criminal Procedure Code*, 18th Edn., pp. 4568, 4569

For the appellant - Low Hop Bing (Tong Teck Yong with him); M/s. Low Hop Bing & Associates
For the respondent - P.L. Tan, DPP

JUDGMENT**Zakaria Yatim J:**

This is an application by the accused in Kuala Lumpur Sessions Court Arrest Case Nos. 69/87 and 70/87 for an order that he be admitted to bail under s. 389 of the Criminal Procedure Code.

On 4 May 1987 the applicant was charged in the Sessions Court for abetting the commission of an offence of criminal breach of trust in A/C No.69/87 and for committing criminal breach of trust in A/C No. 70/87. On the same day, the learned Sessions Judge allowed him to be released on a bail of RM1 million in four sureties. The bail was duly executed and the applicant was released pending his trial, which was fixed on 21 September 1987.

At the commencement of the trial, the learned Deputy Public Prosecutor applied to the Sessions Court for an order that the bail granted to the applicant be revoked. The learned Deputy told the Sessions Court that he had been informed that the applicant "has been harassing and tampering with the witness". He further told the Court that it was "already difficult to get witnesses to come to Court. It is worse if these witnesses are tampered with and harassed ..." The learned Deputy however, was not prepared to reveal the witnesses in question on the ground that "there would be further intimidation." Mr. Tong and Mr. Low Hop Bing, who were Counsel for the applicant in the Court below objected to the application.

After hearing the arguments of both the learned Deputy and Counsel for the applicant, the learned Sessions Judge made an order revoking the applicant's bail and the applicant was accordingly committed to custody.

The question for the Court to consider is whether the order revoking the applicant's bail was a valid order.

It is not in dispute that the learned Sessions Judge has the power to commit a person, who has been released on bail in respect of a non-bailable offence, to custody. Section 388(v) of the Criminal Procedure Code states:

Any Court may at any subsequent stage of any proceeding under this Code cause any person who has been released under this section to be arrested and may commit him to custody.

The Criminal Procedure Code does not lay down the procedure to be adopted by the Court in exercising its discretion under s. 388(v). The learned Deputy in support of his application in the Court below, relied on *Public Prosecutor v. Wee Swee Siang* [1948] 14 MLJ 114. But that case only provided the factors to be taken into consideration when the Court was granting or refusing bail. That case was not concerned with the revocation of bail.

a There seems to be no decided case in this country on the question of revocation of bail under s. 388(v). In the absence of local authority, it is perhaps useful to examine the Indian decisions on this point. The present Indian equivalent of s. 388(v) is s. 437(5) of the Indian Code of Criminal Procedure 1973. Section 437(5) corresponds to s. 497(5) of the old Indian Code of 1898. Section 437(5) of the 1973 Indian Code reads:

b Any Court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do direct that such person be arrested and commit him to custody.

The Indian cases cited by the learned Deputy and learned Counsel were cases decided under the old Indian Code as well as under the 1973 Code. The decisions of the Indian Courts were, however not consistent.

c In *Sant Ram & Others v. State* [1952] Cr LJ 1223, the High Court of Jammu and Kashmir, decided that affidavit evidence was not acceptable to support an application of bail under s. 497 of the 1898 Code. The Court held that the witnesses who had been intimidated by the accused person should testify in Court and they should be subject to cross-examination.

d In *Maibam Bidhu Singh & Others v. Manipur Administration* [1959] Cr LJ 1453, the High Court of Manipur held that it was not essential that positive evidence of witnesses to show that the accused persons were tampering with the prosecution witnesses, must be tendered and the fact proved beyond all doubt before the Court could act under s. 497(5) of the old Code. In that case, the Sessions Judge, after examining one prosecution witness who had turned hostile, cancelled the bail on the ground that the accused were likely to tamper with the evidence. J.N. Dattan JC in his judgment said,

e ... and the learned Sessions Judge was satisfied that there were grounds to believe that the petitioners would tamper with the evidence, if released on bail, and for that he had material in the shape of evidence of a witness, who did not support the prosecution case before the committing Magistrate, yet admitted that the accused persons were influential persons, and villagers were afraid to give evidence against them.

f The High Court of Bombay in *Madhukar Purshothan Monkar & Anor. v. Talab Haji Hussein & Ors.* [1985] AIR Bombay 466, decided that affidavit evidence was sufficient to support an application for the cancellation of bail.

Although the Indian decisions cited above are not consistent, one thing is clear: all the cases agree that the bail of an accused person cannot be cancelled unless there is some form of evidence in support of the application for the cancellation.

g The Indian Court has decided that mere vague allegations would not be sufficient for the purpose of cancelling a bail. In *R.K. Nabanchandra Singh v. Manipur Administration* [1964] 2 Cr LJ 307, Tirumalpad JC, in his judgment at p. 313 said,

h When next we come to the petition filed before the Sessions Judge, we find that further reasons are mentioned for cancelling the bail. They are that the petitioner was involved in a cheating case previously, that he is a man of desperate character, that he was likely to kidnap the girl with the help of other associates of similar desperate character and further that the accused was found to have contacted some of the important witnesses since he was enlarged on bail. No details are mentioned as to the important witnesses, the petitioner was said to have contacted. **Such vague allegations are not sufficient to cancel the bail.** The fact that the petitioner was involved in a cheating case previously is again no reason why bail

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should be refused in the present case. As I pointed out, the Police have been going on adding more and more reasons in their desperate attempt to see that the petitioner was deprived of his liberty.

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(emphasis added)

In the present case, the learned Deputy only made vague allegations of harassment, tampering and intimidation in support of his application to revoke the bail in the Court below. There was no oral or documentary evidence or even an affidavit to support the allegations.

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The *Wee Swee Siang*'s case cited by the learned Deputy in the Court below does not apply in this case. That case was concerned with the granting or refusal of bail.

The considerations for cancellation of bail are different from those for granting bail. Power to take back accused has to be exercised with care and circumspection in appropriate cases, when by a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses. See Sohoni's *Code of Criminal Procedure*, 18th Edn., p. 4568. See also *The State v. Sanjay Gandhi* [1978] AIR SC 961.

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Even when evidence is adduced in support of an application to cancel the bail granted to an accused person, the Court should not allow the application without giving the accused person an opportunity to be heard first. Sohoni's *Code of Criminal Procedure*, 18th Edn., p. 4569.

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For the reasons stated above, I set aside the revocation order made by the learned Sessions Judge and order that the applicant be released forthwith on the terms of the bail bond executed by him and his sureties.

Also found at [1987] 2 CLJ 448

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